United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

with affidavit

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P/S

74-1489

To be argued by
DANIEL H. MURPHY, II

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1489

UNITED STATES OF AMERICA,
Appellee,

—v.—

VIRACHAI SANGUANDIKUL,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

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Docket No. 74-1489

UNITED STATES OF AMERICA,

Appellee,

—v.—

VIRACHAI SANGUANDIKUL,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Virachai Sanguandikul appeals from a judgment of conviction entered on April 9, 1974, in the United States District Court for the Southern District of New York following a four-day trial before the Honorable Arnold Bauman, United States District Judge, and a jury.

Indictment 73 Cr. 794, filed on August 10, 1973, charged Sanguandikul and Kan Lang Ng in two counts with violations of the Federal Narcotics laws. Count One charged Sanguandikul and Ng with conspiracy to distribute narcotics in violation of Title 21, United States Code, Section 846. Count Two charged both defendants with distribution of and possession with intent to distribute of approximately three pounds of heroin hydrochloride (7a).*

* Parenthetical references with the suffix "a" are to the Appellant's Appendix.

A hearing was held January 28, 1974, on Sanguandikul's motion to suppress his confession made in English on the ground that Sanguandikul did not understand English. At the hearing, Sanguandikul demonstrated his understanding of English in the course of a cross-examination conducted in English without the use of the translator, and the Court denied the motion to suppress (H. Tr. 48; Tr. 2).*

Ng is a fugitive (Tr. 152) and was severed on the Government's motion (Tr. 3-4). The trial against Sanguandikul began on January 29, 1974, and ended on February 1, 1974. The jury found Sanguandikul guilty as charged. On April 9, 1974, Judge Bauman sentenced Sanguandikul to concurrent terms of ten years imprisonment on each count to be followed by three years special parole (3a). Sanguandikul is presently serving his sentence.

Statement of the Facts

A. The Government's Case

The Government introduced three pounds of heroin into evidence. The heroin was 95 percent pure (Tr. 20-21). The proof at trial showed that Kan Lang Ng negotiated to sell the heroin to a Government undercover agent for $54,000 on behalf of Ng's source. Ng's source was Virachai Sanguandikul. When Sanguandikul delivered the heroin, he was arrested together with Ng, and the heroin was seized.

At trial, Sante A. Bario, a special agent of the Drug Enforcement Administration, testified that he met with Ng in an undercover capacity on August 6, 1973 (Tr. 66). Ng agreed to sell Agent Bario "three pounds of white rock heroin" for $18,000 a pound, or $54,000 (Tr. 68). Delivery was set for 7:00 P.M. that evening (Tr. 68-69).

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* Parenthetical references with the prefix "H. Tr." are to the hearing transcript; those with the prefix "Tr." are to the trial.

Agent Bario met Ng as scheduled (Tr. 70).* After some preliminary discussions over the place of delivery, Ng called Sanguandikul who agreed to bring the heroin to Agent Bario (Tr. 71-74). Sanguandikul arrived by taxi (Tr. 75) and insisted on checking the $54,000 ("I just want to check the money first." GX 3518, p. 3) before he delivered the heroin. Sanguandikul then left the Government car and returned in a yellow Camaro (Tr. 79). Ng then walked over to Sanguandikul's car and removed a brown grocery bag from the Camaro (*ibid.*). Ng gave the bag to Agent Bario. The top layer of the bag was four rolls of toilet paper; the heroin was in the bottom of the bag (Tr. 80). Agent Bario then signaled the surveilling agents who arrested Ng and Sanguandikul (Tr. 107).

The surveillance officer on the first meeting between Ng and Agent Bario on August 6 was Special Agent Frederick R. Smith who testified at the trial (Tr. 168). The surveillance officer on the recorded August 6 meeting, Special Agent Joseph P. Salvemini, testified at the trial (Tr. 97). Agent Salvemini also monitored the recording of the conversations (Tr. 97-98).

The Government also introduced a confession by Sanguandikul where Sanguandikul stated he was to receive $1,500 for making the delivery (Tr. 30). The forensic chemist, Dennis Walczewski, testified that the heroin seized was 3.00 pounds of 95 percent pure heroin hydrochloride (Tr. 20-21).

B. The Defense Case

Virachai Sanguandikul took the stand in his own defense. He admitted that he had been in the United States since 1968 (Tr. 197), that he had gone to Essex County

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* The agent's car was wired and the recordings (GX 7; Tr. 88) and transcripts (GX 3517, 3518; Tr. 109) of the conversations in the car were introduced at trial.

College in New Jersey in 1970 (Tr. 198-199), that he had a New Jersey driver's license (Tr. 199), that he used taxis and purchased meals and groceries in New York (Tr. 200) and that his conversations with Ng and with Agent Bario had been in English (Tr. 201). Nevertheless, Sanguandikul on his attorney's instructions testified through a Thai interpreter (Tr. 178-179). He testified that an unidentified male "Sam" had paid him $70 (Tr. 185) to deliver "medicine" (Tr. 190) to Agent Bario and that Sanguandikul made the delivery only in the sense of "doing a friend a favor". (*Ibid.*).

C. Rebuttal

On rebuttal, Lloyd E. Young, an assistant dean of student affairs at Essex County College, produced Sanguandikul's college transcript (GX 8, Tr. 206) and testified that all but one of his courses had been taught in English (Tr. 207).

D. The Jury Deliberations

The alternate juror was excused at the close of the Court's charge (267a). The jury began deliberations at 2:00 P.M. January 31, 1974 (268a), returned to the court room at 3:55 P.M. to listen to evidence (270a), resumed deliberations at 5:35 P.M. (273a), and was excused for the night at 6:35 P.M. when it reported that it had not yet agreed upon a verdict (274a). At 9:30 A.M. on the next day, the Court informed counsel that it had "just received the following note:

> "Your Honor, I request your permission to be excused from the jury on the ground any action would be of a prejudice to the defendant. Also on the ground that my present view of the case is of bias feeling and extreme doubt. I hope your Honor will grant me this wish. [Signed Juror No. 2]." (276a-277a).

The Court stated that it would not grant the request unless both counsel assented (277a):

> "Well, I really feel I have no intention of excusing Mr. Lai at this point unless you both indicate that you want him excused and will consent to proceed with a jury of eleven. Other than that we will continue."

The Government assented. Defense counsel after its *pro forma* motion for a mistrial was denied also assented (*ibid*). The Court then pressed the defense counsel for an alternate solution to the problem ("I invite you to comment if you wish." 278a.). The defense again assented to excusing Juror No. 2 (*ibid*). The Court refused to act until defense counsel had spoken with the defendant (278a-279). Then, the Court examined the defendant in the presence of his lawyer (279a-280a), before, convinced that the waiver was voluntary and knowing and on the advice of counsel, the Court agreed to permit the trial to continue with eleven jurors (280a). Some two hours later (286a, 280a), the jury returned its verdict.

ARGUMENT

The ambiguous note from a reluctant juror asking to be excused during deliberations did not require the declaration of a mistrial.

The Government proved by overwhelming evidence that Sanguandikul was the source of three pounds of 95 percent heroin passed hand-to-hand to an undercover agent. The undercover agent testified, the surveillance agents testified, conversations with the defendant were taped, and the defendant's confession was introduced. The defendant took the stand, and his attempt to hide behind a foreign language was exposed. Appellant can find no error in the trial, in the pre-trial suppression hearing, or in the charge. Instead,

appellant points to the fortuity that one juror balked at performing his duty asking to be excused "on the ground any action would be of a prejudice to defendant. Also, on the ground that my present view of the case is of bias feeling and extreme doubt." (276a-277a). Immediately upon receiving the juror's communication, the Court sought to deal with it in such a way that the right of each side to a fair trial was kept in balance with the juror's duty as a citizen:

> "Well, I really feel that I have no intention of excusing Mr. Lai at this point unless you both indicate that you want him excused and will consent to proceed with a jury of eleven. Other than that we will continue." (277a).

The Government assented to a jury of eleven. The defense moved *pro forma* for a mistrial then, as glibly, consented to a jury of eleven (277a).

> "[Government]: I don't object to eleven.
>
> "[Defense]: At this time I would like to move for a mistrial.
>
> "The Court: Denied.
>
> "[Defense]: I will consent to the removal of the juror."

The Court examined defense counsel to be assured that the waiver was a knowing one and asked for a suggestion from the defense on how to proceed (278a):

> "The Court: I invite you to comment if you wish. Will you agree that he be excused and that the jury continue?"

Instead, the defense counsel preserved his record on his motion for a mistrial and agreed to excuse the juror (*ibid.*):

> "[Defense]: In light of the fact that you denied my motion for a mistrial, I will consent at this time that Juror No. 2 be excused and that the deliberations continue without Juror No. 2 being present."

Sua sponte, the Court refused to accept the waiver until the defense counsel had spoken with the defendant (278a-279a). Only then was the reluctant juror excused (280a).

It is clear that under this Court's ruling in *United States* v. *Vega,* 447 F.2d 698 (2d Cir. 1971), *cert. denied,* 404 U.S. 1038 (1972), Sanguandikul must be bound by his informed consent to a verdict by eleven jurors unless he can demonstrate that his consent was erroneously compelled by the improper denial of his motion for a mistrial. He cites no authority, however, for his contention that a mistrial was required.

The cornerstone to appellant's argument is the assertion that the juror's note was a writing "to the judge informing him of [the juror's] prejudice, bias and extreme doubt against the defendant" (Appellant's Brief, p. 10) or, again, that the reluctant juror was "admittedly prejudiced against the defendant." *Id.,* p. 12. But that assertion is an argument not a fact. The note leaves the juror's vote ambiguous. The first reason, "on the ground any action would be of a prejudice to the defendant", indicates that his vote would be to convict, since it is difficult to see how a vote to acquit "would be of a prejudice to the defendant." Since "prejudice" is proffered as a result of his vote not as the cause of his vote, prejudice is used in the sense of a "hurt" not in the sense of "bias". The second reason, "on the ground that my present view of the case is of bias feeling and extreme doubt," indicates that his vote would be to acquit for it couples "bias feeling" * with "extreme doubt." That ambiguity on the juror's prospective vote is reflected in the actions of trial counsel since both the Government and the defense agreed to excuse the juror (277a-278a).

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* Both Juror No. 2 and the defendant are Asian (277a).

When the Court first received the note, the note was reviewed, and the Court found no grounds on its face which would make the juror's retention impermissible (277a): *

> "Well, I really feel I have no intention of excusing Mr. Lai at this point unless you both indicate that you want him excused and will consent to proceed with a jury of eleven. Other than that we will continue."

Prima facie the Court's finding was neither clearly erroneous nor was the consequent refusal to grant a mistrial an abuse of discretion.

Further, the Court asked counsels' opinion but both elected to rely on the record and not to inquire further into the reluctant juror (278a):

> "The Court: I invite you to comment if you wish. Will you agree that he be excused and that the jury continue?
>
> "[Defense]: May I see the note?
>
> "The Court: You may see it.
>
> "[Defense]: Thank you.
>
> (Handed to counsel).
>
> "The Court: That will be marked as a court exhibit.
>
> (Note marked as Court Exhibit 2).
>
> "[Defense]: In light of the fact that you denied my motion for a mistrial, I will consent at this time that Juror No. 2 be excused and that the deliberations continue without Juror No. 2 being present."

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* This case bears no resemblance to cases in which improper external influences have been brought to bear on the jury. *E.g. United States* v. *Rattenni*, 480 F.2d 195 (2d Cir. 1973) (prejudicial publicity); *United States ex rel. Owen* v. *McMann*, 435 F.2d 813 (2d Cir. 1970) (injection into the deliberations by several jurors of factual material from outside the record). Nor was there any indication that the juror was unable to abide by his oath or that he had misled the court. Compare *e.g., United States* v. *Floyd*, slip op. 3023, 3036-37, — F.2d — (2d Cir. April 25, 1974).

Had defense counsel been particularly concerned about preserving his right to a trial by a jury of twelve, he clearly had the opportunity to request that the judge make additional inquiries of Juror No. 2 concerning the meaning of the note. Electing to read the note as hostile to his client and obviously seeking to avoid a clarification of the note which would result in the retention of a juror who had decided on conviction for wholly legitimate reasons, he made no response to Judge Bauman's request for suggestions on how to proceed but rather consented to the excusing of Juror No. 2.

The drastic remedy of mistrial is a remedy of last resort, not of first resort; it is "to be used with the greatest caution", *United States* v. *Perez,* 22 U.S. (9 Wheat.) 579, 580 (1824). There is no "mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial." *Illinois* v. *Somerville,* 410 U.S. 458, 462 (1973).

The parties received a note from a juror who asked to be excused for ambiguous reasons. Neither party asked the Court to inquire further. The Court did not truncate counsels' strategic options. Each counsel considered the note from the standpoint of his client's interest; each chose to exclude the reluctant juror and to abide by the verdict of a jury of eleven. There is no error on this trial record.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
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DANIEL H. MURPHY, II,
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Assistant United States Attorneys, Of Counsel.

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline Troia being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the 1st day of
August 19 74 she served ~~a copy~~ 3 copies of the within

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by placing the same in a properly postpaid franked envelope
addressed:

Theodore Kreiger, Esq.,
401 Broadway
New York, NY

And deponent further says
she sealed the said envelope and placed the same in the
mail chute drop for mailing in the United States Courthouse,
Foley Square, Borough of Manhattan, City of New York.

Pauline Troia

Sworn to before me this
1st day of August 19 74

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975